part of the Indorsement of Claim struck out. Those parts the bank sought to strike out were:

(a) for an order that the judgment entered against the plaintiff (Tio) by the defendant (the bank) in C.S. No. 181/69 and 182/69 be set aside; and

(b) that all execution proceedings so instituted or to be instituted in the future in C.S. No. 181/69 and 182/69 be stayed until the suit be tried.

The learned trial Judge (Haji Wan Mohamed J.) noted that Tio had in fact tried on many occasions to stop the respondent bank from proceeding with the order of execution and had invariably failed for lack of merit in each and every application. The Judge therefore held that the indorsements earlier mentioned were frivolous and vexatious and otherwise an abuse of the process of the court, and accordingly ordered them to be struck out.

Also in the same judgment the Judge considered Tio's application to reamend the amended statement of claim to include an allegation of fraud.

He noted that on February 5, 1980, counsel for the defendants (the present respondent) had filed a written submission, a copy of which was provided to Tio on February 6 1980, and the relevant part of which is a citation from *Halsbury's* Laws of England Vol. 22 paragraphs 1669 and 1670 which says that no final judgment may be set aside in an action except in an action for fraud on fresh evidence which would have material effect upon the decision of the Court. After that submission had been made Tio sought leave to reamend his amended Statement of Claim to include fraud. The learned Judge found that this prayer to reamend was not made *bona fide,* remarking that since the judgment in the two earlier cases had been made in 1970 it was most improbable that Tio had over ten years later just come to realise that these judgments had been obtained fraudulently. He therefore dismissed the application to reamend the amended Statement of Claim.

In the instant suit under appeal, Civil Suit No. 1170 of 1982, the learned trial Judge did consider at some length the history of this whole matter, though unfortunately it was examined through the eyes as it were of Tio, being confined to facts referred to in his Statement of Claim. We need not set out in detail the facts so considered except to say they are set out in pages 184 to 190 of the Record.

Therefore the appellate court is placed at no disadvantage in drawing its own inferences as it would otherwise have been if it had been dealing with findings of facts arising from *viva voce* testimony before the learned trial Judge. In addition this court has the added advantage that it could review the history as seen not merely through the eyes of Tio, but also take into account a lot of other matters which Tio himself can hardly dispute.

Having therefore given careful consideration to the whole history of this unfortunate affair we must, with respect, say that the learned Judge had erred in not holding that this suit brought by the respondent Tio discloses no reasonable cause of action and is vexatious and an abuse of the process of the court.

In the result this appeal on those counts alone should be allowed with costs here and below.

It also follows that on the issue of limitation, the respondent should also fail, the matter on which he relied having occurred more than 3 years before the issue of writ.

Appeal allowed.

Solicitors: *Peter Loh & Co.; Rayner & Co.*

TAY GUAN HO v. CHIN HUAT HIN CO.

[S.C. (Lee Hun Hoe C.J. (Borneo), Wan Suleiman & Seah S.C. JJ.) April 30 & May 26, 1986 & May 2, 1987]

[Kota Kinabalu – Supreme Court Civil Appeal No. 429 of 1985]

Partnership – Whether property partnership property – Property bought by partner in his own name – Whether transferred by proprietor – Whether property held on constructive trust for partnership – Partnership Act, 1961, ss. 22 & 23.

Trust – Constructive trust – Mere declaration of trust not sufficient to confer any interest in land – Whether Statute of Frauds applicable – Law of Property Act, 1925 – Sabah Application of Laws Ordinance, 1951.

In this case one Tay Gek Lin (deceased) founded the respondent firm and ran it on a sole proprietorship

basis but with a partnership facade confined to family members. In 1958 he obtained state land on a ninety-nine year lease and erected a shophouse on the land financed by a loan from the Chartered Bank. The bank loan was fully settled by the end of 1969. Assessments, rates, quit rents payable to the local authorities and insurance premiums in respect of the shop house were paid by the firm until the appellant claimed ownership of it. In 1964 the deceased transferred the land to the appellant for love and affection. The firm used the shop house free of charge. After the death of the deceased in 1968 the youngest son of the deceased assumed power in the firm and he caused the firm to stop payment of assessment. The appellant had to pay the assessment for the years 1968 to 1973 by instalments. In 1980 the appellant obtained a rent order from the Labuan Rent Tenancy Tribunal fixing the rent of the shop house at $1,200-00 per month. As the rent was not paid the appellant commenced distress proceedings and obtained the nett proceeds of sale towards settlement of the arrears of rent. The rent was subsequently still not paid and the arrears came to $18,680-20 up to the month of May 1981. In April 1981 the appellant terminated the tenancy of the shop house and claimed possession of it. The respondents contended that the distress was wrongful as no rent was payable as the property was partnership property. They counterclaimed for damages and for a declaration that the appellant held the property in trust for the benefit of all the partners of the respondent firm. The learned trial judge found that the appellant held the property in trust for the partnership and he ordered the appellant to refund the proceeds of sale. The appellant appealed.

Held, allowing the appeal: the evidence did not support the finding of the learned judge that the property was partnership property and that the appellant held the property on constructive trust. On the evidence the respondents have not brought their case within the ambit of section 23 of the Partnership Act, 1961;

(2) the respondents are ordered to vacate the premises one month from the date of the judgment;

(3) the proceeds of the auction sale should be paid to the appellant towards payment of arrears of rent.

Cases referred to:

(1) *Lee Phek Choo* v. *Ang Guan Yau & Anor.* [1975] 2 M.L.J. 146.

(2) *Chin Yuk Kon* v. *Chop Koong Onn* [1949] S.C.R. 19, 20.

(3) *Forster* v. *Hale* (1798) 30 E.R. 1226.

(4) *Yong Wee Ming* v. *Chin Thian Guan* [1984] 1 M.L.J. 236.

SUPREME COURT.

Ronald Khoo (*John Kah* with him) for the appellant.

J.J. Puthucheary (*Lawrence' Thien* with him) for the respondents.

Cur. Adv. Vult.

Lee Hun Hoe C.J. (Borneo) (delivering the Judgment of the Court): This appeal concerns a piece of land described as Labuan Town Lease No. 507 together with the shophouse thereon known as No. 132, Jalan O.K.K. Awang Besar, Labuan (hereinafter referred to as "the property").

In the nineteen thirties Tay Gek Lin (deceased) founded the respondent firm and ran it on a sole proprietorship basis but with a partnership facade confined to family members. On August 14, 1958, the State Government alienated the said land to the deceased for a term of ninety-nine years in consideration of the payment of $6,000.00 and subject to the payment thereafter of annual rent of $150.00. In 1959 he erected a shophouse on the land financed partly by a loan from the Chartered Bank. The bank loan was repaid and fully settled by the end of 1969. Assessments, rates, quit rents payable to the local authorities and insurance premiums in respect of the shophouse were paid by the firm until the appellant claimed ownership of it. In 1964 the deceased transferred the land to the appellant, Tay Guan Ho, for love and affection. At that time the deceased was seriously ill, and all his sons were abroad except for his eldest son, the appellant. Douglas Tay Guan Shung was his youngest son.

The payment of assessment, quit rent, rates or insurance premium by the firm did not by itself constitute any evidence or give rise to any inference that the shophouse was the partnership property. As the firm had used the shophouse free of charge it was only natural and reasonable for the firm to pay these outgoings. However, after the deceased died in 1968 Douglas Tay assumed power in the firm. He caused the firm to stop payment of assessment resulting in the Labuan Town Board, through its solicitors, sending a demand letter and the appellant had to pay the assessment for years 1968 to 1973 by instalments. Had the appellant treated the shophouse as partnership property he would not have bothered to pay the assessment at all or would have, after making the payment, taken action to recover the money from the firm.

On October 9, 1980, the appellant obtained a rent order from the Labuan Rent Tenancy Tribunal under the provisions of the Rent Control (Business Premises) Enactment, 1966 fixing rent of the shophouse at $1,200.00 per month. The appellant claimed that the respondent firm failed to pay rent since November 1, 1979, and he commenced distress proceedings on December 2, 1980, and obtained the nett proceeds of sale amounting

to $4,119.80 towards the settlement of arrears of rent of $13,200.00. Up to the month of May, 1981 the appellant claimed the arrears of rent owing by the respondent firm to be $18,680.20. By notice dated April 10, 1981, the appellant terminated the tenancy of the shophouse and claimed possession of it.

The respondents contended that the distress was wrongful as no rent was payable for "the property" was partnership asset. They counterclaimed for special and general damages and also prayed for a declaration that the appellant held "the property" in trust for himself and other partners of the respondent firm. The learned Judge agreed that the appellant held "the property" on constructive trust for the benefit of all the partners of the respondent firm. In dismissing the counterclaim the learned Judge very properly castigated Douglas Tay for his indifferent attitude in managing the respondent firm thus causing the appellant to take distress proceedings. He ordered the appellant to refund the proceeds of the sale amounting to $4,911.80 and to pay costs to be taxed. The appellant appealed.

The main issue is whether "the property" is partnership property. The appellant says it is not. On the other hand, the respondents contend that the deceased bought the land and erected the shophouse thereon with the money belonging to the firm. It is therefore the firm's property by virtue of section 23 of the Partnership Act, 1961 which provides that:

"Unless the contrary intention appears, property bought with money belonging to the firm is deemed to have been bought on account of the firm."

The appellant's case may be outlined. It is not in dispute that all the capital for the running of the firm's business came from the deceased. Although the firm is a partnership, albeit a family one, it has been run by the deceased as if he was the sole proprietor. In 1958 the partners were the deceased, Tay Cheng Kong (deceased's brother), Tay Kok Yong (deceased's nephew) and the appellant (deceased's eldest son). In 1959 Tay Cheng Kong left the firm. Both Tay Kok Yong and the appellant were made partners without having to make any payment. In fact, it seems that none of the partners taken in has to pay for the partnership. They remained the only three partners in the firm until 1962 when the deceased ceased to be a partner. Douglas Tay only became a partner in 1966. The appellant worked as the deceased's assistant and was paid a monthly salary. There was never any division of profits. The deceased clearly had sole control of the firm including the firm's money. It was for this reason that the appellant said, in evidence, that he could not distinguish between the firm's money and the deceased's money. The circumstances were such that they indicated that the deceased bought the land for his own account and erected the shophouse as his own. The deceased's other conduct also show that he intended "the property" to be his own and not that of the partnership. Hence, after his withdrawal as a partner he kept "the property" as his own. He never consulted the other partners when he decided to transfer "the property" to the appellant. He caused a special account to be kept and called it "Chin Fui Kee" account in order to separate "the property" account from that of the firm. If the deceased intended that "the property" to be that of the firm he would have arranged for the names of the partners to be included as registered owners before his death in 1968. The indication is that the deceased treated "the property" as his own from the very beginning.

According to Tay Kim Hoi (D.W.2) apart from the balance sheet as at June 30, 1971, which showed an item "House and land ... $136,000.00," there was no record in the accounts of the firm to show that "the property" was the property of the firm. It must be remembered that at the time Douglas Tay was in charge of the firm. The balance sheet was obviously prepared by him or at his instruction. This will affect the weight to be attached to it. In fact, the respondents were unable to adduce clear evidence to show that "the property" was bought with the firm's money. The respondents relied on the appellant's admission contained in his affidavit as well as receipts from the contractor Lee Chin Hin to establish that the money for construction of the shophouse came from the firm. It is the contention of the appellant that there was no direct evidence to prove that the firm's money was used to pay the contractor. Curiously enough, Tay Kok Yong who was and is still a partner in the firm was never called to give evidence. He would be the best person to clear any doubt regarding "the property." Further, the appellant pointed out that there was no evidence to show that the deceased obtained a loan from the Chartered Bank towards the payment of the construction of the shophouse. There is, therefore nothing to link the alleged payments made by the firm to the Chartered Bank with the construction of the shophouse. Further, appellant submitted that there is

no evidence to show that the firm had treated the shophouse as partnership property. The firm was allowed free use of the shophouse. It was therefore natural and reasonable to expect the firm to be responsible for quit rent, assessment and insurance premium and other outgoings in respect of the shophouse.

Unless it can be shown that "the property" was a trust property in the deceased's hands, and not his own property, then it could not be turned into a trust property in the appellant's hands. The appellant conceded that if the deceased held the property under a trust for the partnership then the appellant, on accepting the transfer of the property from the deceased, would automatically take upon himself the trust. If there had been any trust at all, it would have been created at the time of the purchase and not thereafter.

According to the appellant he had in July 1971 intimated to the other partners that he was the registered owner of "the property" in question. Neither Douglas Tay nor Tay Kok Yong ever asked the appellant to return the title deed to the firm or question his right to the title. Neither did the firm challenge the making of the Rent Order in respect of the shophouse. The firm could not now say the firm was not liable to pay rent or question the distress proceedings.

The respondent's case may now be set out. "The property" was at all times in the deceased's name until it was transferred to the appellant in 1964. As "the property" was bought with the firm's money it was partnership property by virtue of section 23 of the Partnership Act, 1961. The appellant himself admitted that the money for the shophouse was paid by the firm. Therefore, when the deceased transferred "the property" to the appellant all he could transfer was the bare title to that property. At all times the beneficial interest in that property was in the partnership. Section 22(1) of the Partnership Act reads:

"All property and rights and interests in property originally brought into the partnership stock or acquired whether by purchase or otherwise on account of the firm or for the purposes and in the course of the partnership business are called in this Act partnership property and must be held and applied by the partners exclusively for the purposes of the partnership and in accordance with the partnership agreement:

Provided that the legal estate or interest in any land which belongs to the partnership shall devolve according to the nature and tenure thereof and the general rules of law applicable thereto but in trust, so far as necessary, for the persons beneficially interested in the land under this section."

The crucial point in this case is whether the deceased held "the property" on his own or in trust for the partnership. Unless the respondents can satisfy the court that the deceased held "the property" in trust for the partnership it could not turn "the property" into a trust property in the hands of the appellant. When "the property" was in the deceased's hands no one ever challenged him as to his rights in "the property." The dispute as to ownership came up only after the appellant demanded rent from and took distress proceedings against the firm. We think the learned Judge was right to be critical of Douglas Tay. Clearly, he was not running the firm efficiently as the learned Judge remarked at page 13 of the Appeal Record:

"The conduct and manners of Douglas Tay Guan Shung in managing the firm and his indifferent attitude in the affairs of the Defendant firm caused the Plaintiff to take distress proceedings against the Defendant firm ....."

He was equally critical of the partners when he said at the same page:

"... It is also my considered opinion that the other partners are equally quarrelsome or at least show no sign of good faith in trying to solve the problem and the trouble developed among themselves as partners of the Defendant firm ....."

The respondents complained that there was no consultation with the other partners when the deceased transferred "the property" to the appellant. The simple answer is that he had no reason to consult the other partners if he was dealing with his own property and not that of the partnership.

Although the matters of trust and the Statute of Frauds were raised in the court below the learned Judge did not deal with them in his judgment except to say that the appellant held "the property" on constructive trust for the benefit of all the partners of the firm. In his reply to the defence the appellant pleaded that the English Statute of Frauds is applicable to Sabah by virtue of section 2 of the Application of Laws Ordinance, 1951 (Cap. 6). Since there is nothing in writing signed either by the appellant or the deceased to manifest the declaration of trust it could not be that a trust was created in respect of "the property" as alleged by the respondents. In answer the respondents submitted that even if the Statute of Frauds were applicable in Sabah it only applies to express trusts and not those that are created or operated

as resulting or constructive trusts. The courts have never allowed the Statute of Frauds to be used for the commission of a fraud as the statute itself is meant to prevent fraud.

It is true that the Federal Court based its decision in *Lee Phek Choo* v. *Ang Guan Yau & Anor.*[1] on the applicability of the Statute of Frauds. The respondents submitted that it was decided *per incuriam*. *Keeton* in "The Law of Trusts," 7th Edition, page 207 states:

"In *Lloyd* v. *Spillet* ((1740) Barn. C. 384) it was said that although this presumption might exist in respect of pure personality, it had no application where a transfer of interests in land was made in similar circumstances, since the Statute of Frauds, 1677, Sec. 7, required trusts of land to be manifested and proved by writing. Such reasoning however, would seem to be fallacious, for, altogether apart from the fact that Equity has never allowed the Statute to be used to effect a fraud, Sec. 8 excepts all trusts arising by implication of law from the requirements of Sec. 7 ...".

The point made by the respondents is that section 7 of the Statute of Frauds as such was not received into Sabah pursuant to the Application of Laws Ordinance, 1951. The reason is that when the English Law of Property Act, 1925 was enacted it expressly repealed, by its 7th Schedule, sections 1, 2, 3 and 7 of the Statute of Frauds and in section 4 it repealed the words:

"Or upon any completion of sale of lands tenements or hereditaments or any interest in or concerning them."

It also repealed sections 8, 9 and 24. The particular provision of the Statute of Frauds with which we are concerned, that is, section 7, was in fact, as stated earlier, repealed and re-enacted in section 53(1) of the Law of Property Act, 1925 which now provides that:

"A declaration of trust respecting any land or any interest therein must be manifested by some writing .....".

Section 53(2) goes on to provide that the above requirements do not affect the creation or operation of resulting, implied or constructive trusts. The relevant provision, if it were at all receivable in Sabah, was not section 7 of the Statute of Frauds but in fact section 53 of the Law of Property Act, 1925. Sabah has its own land law based on the Torrens System. The Law of Property Act, 1925 is not a statute of general application. It is not possible to extend the applicability of the Law of Property Act, 1925 to Sabah pursuant to the Application of Laws Ordinance, 1951.

The decision of *Lee Phek Choo's* case was to a large extent influenced by the case of *Chin Yuk Kon* v. *Chop Koong Onn*[2] where in an alleged contract of guarantee the position was accepted as governed by the Statute of Frauds. As it is not the respondent's case that there is an express trust created in favour of the partners of the firm the appellant did not find it necessary to submit on the Statute of Frauds. The appellant conceded that the Statute of Frauds applies to an express trust. *Lee Phek Choo's* case is limited in its applicability to Sarawak and whether it has been decided *per incuriam* or it applies to Sabah or not would have to be left open to another occasion when we have the opportunity of hearing fuller arguments from both sides.

The way the deceased ran the business of the firm has contributed to the present difficulty. Even the appellant could not tell whether the deceased was using the firm's money or his own money to acquire "the property." Douglas Tay's testimony and documentary evidence prepared after 1969 when the Chartered Bank loan was settled should be weighed carefully. The only witness who can give credible evidence in this case is Tay Kok Yong but no explanation was given as to why he was not called to give evidence. When Douglas Tay became aware of the transfer of "the property" to the appellant by the deceased he never questioned it. He could have lodged a caveat under section 116 of the Sabah Land Ordinance (Cap. 68) to protect the trust. Also, it should be borne in mind that the transfer was effected when the deceased had ceased to be a partner of the firm. Hence, this case can be distinguished from *Forster* v. *Hale*[3] which appears to decide that land purchased in the name of one partner, but paid for by the firm, is the property of the firm, although there may be no declaration or memorandum in writing disclosing the trust and signed by the partner to whom the land has been conveyed.

It is appropriate to point out that in *Yong Wee Ming* v. *Chin Thian Guan*[4] the Federal Court held that a mere declaration that a trust existed is not sufficient to confer any interest on the land: there must be evidence in writing to that effect, when dealing with an application to remove the caveat. As Seah F.J., as he then was, remarked at page 237.

"In other words, the principle of indefeasibility of title conferred by registration under the Torrens System cannot be defeated by setting up the fiction of a trust or by applying the principles of what has been called constructive or equitable notice."

Reference was made to the Chin Fui Kee accounts. The deceased kept two such accounts, namely, "Chin Fui Kee A account" and "Chin Fui Kee B account." Apparently, remittances to deceased's mother in China were recorded in the "Chin Fui Kee A account." However, there was no satisfactory explanation as to the existence of the "Chin Fui Kee B account" albeit some payments to the Chartered Bank appeared in this account. No reliable person was called to explain these two accounts. We would like to know whether the "Chin Fui Kee B account" was a partnership account or that of the deceased. Also, whether the money in the "Chin Fui Kee B account" belonged to the partnership or that of the deceased. Even if the "Chin Fui Kee B account" belonged to the firm there was no clear evidence to show that "the property" was bought with the money belonging to the firm. On the documentary evidence it was clear that the shophouse was constructed with money advanced by the Chartered Bank and some had been repaid from money in the "Chin Fui Kee B account."

In our view, on careful analysis, we are unable to find any clear evidence that the Chartered Bank loan was repaid by money belonging to the partnership. We are unable to support the finding of the learned Judge that "the property" was partnership property and that the appellant held "the property" on constructive trust. Also, we do not consider that on the evidence the respondents have brought their case within the ambit of section 23 of the Partnership Act, 1961. Accordingly, we would allow the appeal with costs here and the court below. The deposit is to be refunded to the appellant. Consequently, we consider that the appellant should be entitled to his claims under paragraph 8 of his statement of claim. The respondents are ordered to vacate the premises one month from the date of the judgment.

We confirm the dismissal of the counterclaim. However, the order to pay the respondents the sum of $4,119.80 arising out of the auction sale which followed the distress for rent proceedings ought to be varied. We order that the sum of $4,119.80 be paid to the appellant towards the payment of arrears of rent as claimed under paragraph 8 of the statement of claim.

Order accordingly.

Solicitors: *Jayasuriya Kah & Co.; Chau & Thien.*

RAMLAN BIN SALLEH v. PUBLIC PROSECUTOR

[S.C. (Wan Suleiman, Mohamed Azmi & Syed Agil Barakbah S.C.JJ.) February 23 & May 11, 1987]

[Kuala Lumpur – Supreme Court Criminal Appeal No. 13 of 1986]

Criminal Law and Procedure – Charge of murder – Trial by jury – Duty of judge to put all available defences whether or not relied upon by accused, having regard to the evidence – Defence of grave and sudden provocation put to jury – Defence that accused never intended to kill but merely wanted to frighten the deceased – Possible verdict of firing rifle in a rash or negligent manner not put to jury – Retrial ordered – Penal Code, ss. 302 & 394A.

Penal Code, ss. 302 & 394A – Murder – Defence of grave and sudden provocation – Defence that accused never intended to kill but merely wanted to frighten deceased.

The appellant had been convicted for murder and appealed against his conviction. It was alleged that while on guardroom duty at the entrance to the military camp where he was stationed the appellant shot and killed his superior officer, the deceased. The deceased was the appellant's immediate superior and the alleged motive for the shooting was the cancellation of the appellant's leave as a result of a disciplinary proceeding on a traffic charge lodged by the deceased against him for not wearing a crash helmet when riding a motor cycle. At the trial the learned Judge reminded the jury that to constitute murder the prosecution was not obliged to prove motive as distinct from an intention to kill and he also put to the jury the incident of leave cancellation as a basis for the defence of grave and sudden provocation which would reduce the offence to culpable homicide not amounting to murder. He directed the jury to consider two possible verdicts (a) guilty of murder; (b) guilty of culpable homicide not amounting to murder.

On appeal it was argued that the judge had failed to put to the jury a third alternative verdict arising from the appellant's defence, namely, guilty of an offence under section 304A of the Penal Code for causing death by a rash or negligent act. In his summing up the learned judge had referred to the defence that the accused had never intended to kill or even to wound the deceased and that he merely wanted to frighten him. However the possible verdict under section 304A was not put to the jury.

Held: it was the duty of the judge to put to the jury the defence that the shooting was merely to frighten the deceased as a third alternative verdict and it was for the jury to accept or reject the defence. The conviction must therefore be quashed and a retrial ordered.

Case referred to:

(1) *Loo Geok Hong* v. *Public Prosecutor* [1961] M.L.J. 157.